ZI Publications Sdn Bhd & Anor v Jabatan Agama Islam Selangor & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-383–10 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ASMABI MOHAMAD JJCA
17 JULY 2017

Administrative Law — Judicial review — Validity of legislation — Validity of s 16 Syariah Criminal Offences (Selangor) Enactment 1995 — Jurisdiction of High Court to hear judicial review application — Whether decision in ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) only concerned with competency — Whether issue of validity of legislation had been decided

The first appellant had published a book *Allah, Kebebasan dan Cinta* ('the book'). Following a raid by the first respondent at the first appellant's office, 180 books were confiscated and the second appellant, the majority shareholder and director of the first appellant, was arrested and charged at the Syariah Court under s 16 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('s 16'). The appellants filed for judicial review at the High Court, seeking a declaration that s 16 was null and void. The respondents raised a preliminary objection that, based on the case of *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153 ('ZI Publications'), which was decided by the Federal Court, the court had no jurisdiction to hear the judicial review application. However, the appellants argued that *ZI Publications* was only concerned with the competency of the legislative power of the Selangor State Legislative Assembly ('the SSLA') in enacting s 16. It was held that since the Federal Court had decided that s 16 was valid and not ultra vires the Federal Constitution, 'everything falls'. The High Court allowed the preliminary objection and dismissed the judicial review application. Hence, the appellants appealed.

Held, allowing the appeal with no order as to costs:

(1) The High Court Judge failed to appreciate that there was a distinction between challenging the competency of the SSLA to enact the said section and challenging the consistency of the said section vis a vis arts 8 and 10 of the Federal Constitution. There were merits in the submission

of the appellant that in dismissing the judicial review application on the basis of the preliminary objection, the High Court judge erred in failing to fully appreciate the issues that were before the Federal Court and the issues pending before Her Ladyship (see paras 24 & 26).

(2) Under the Federal Constitution, written law may be invalidated by the court on one of three grounds ie: (a) in the case of federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of state written law, because it relates to a matter with respect to which the State Legislature has no power to make law; (b) in the case of both federal and state written law, because it is inconsistent with art 4(1); or (c) in the case of a state written law, because it is inconsistent with federal law. The High Court retained the jurisdiction to consider the issue whether the said section which was declared to be validly enacted by SSLA was inconsistent or otherwise with arts 8 and 10 of the Federal Constitution, because that consistency challenge fell under ground (2) and that was not the ground for the petition before the Federal Court in *ZI Publications* (see paras 27–28).

(3) The High Court judge erred in dismissing the judicial review application on the preliminary objection and in concluding that the matter in the judicial review application had been decided by the Federal Court. A distinction had to be drawn between the law itself and the enforcement of such law. The validity of the said section did not automatically render the action of the respondents under the section valid. It was for the High Court to determine whether or not the action taken by the respondents was valid in accordance with the said section (see paras 31 & 39).

[Bahasa Malaysia summary

Perayu pertama telah menerbitkan sebuah buku berjudul *Allah, Kebebasan dan Cinta*. Berikutan satu serbuan yang dibuat oleh responden pertama di pejabat perayu pertama, 18 buah buku dirampas dan perayu kedua, pemegang saham majoriti dan pengarah perayu pertama, ditahan dan dipertuduh di Mahkamah Syariah bawah Enakmen Kesalahan Jenayah Syariah (Selangor) 1995. Perayu-perayu memfailkan semakan kehakiman di Mahkamah Tinggi, memohon deklarasi bahawa s 16 tidak sah dan terbatal. Responden-responden membangkitkan bantahan awalan bahawa, berdasarkan kes *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153 ('ZI Publications'), yang diputuskan oleh Mahkamah Persekutuan, mahkamah tidak mempunyai bidang kuasa mendengar permohonan semakan kehakiman. Walau bagaimanapun, perayu-perayu menghujahkan bahawa *ZI Publications* hanyalah berkenaan kekompetenan kuasa legislatif Majlis Undangan Negeri Selangor ('MUNS') dalam menggubal

s 16. Diputuskan bahawa oleh kerana Mahkamah Persekutuan telah memutuskan s 16 sah dan tidak ultra vires Mahkamah Persekutuan, 'everything falls'. Mahkamah Tinggi membenarkan bantahan awalan dan menolak permohonan semakan kehakiman. Oleh itu, perayu-perayu merayu.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Hakim Mahkamah Tinggi gagal mempertimbangkan bawah terdapat perbezaan antara mencabar kekompetenan MUNS menggubah seksyen tersebut dan mencabar kekonsistenan seksyen tersebut berbanding perkara 8 dan 10 Perlembagaan Persekutuan. Terdapat merit-merit dalam hujahan perayu bahawa dalam menolak permohonan semakan kehakiman berdasarkan bantahan awalan, hakim Mahkamah Tinggi terkhilaf kerana gagal mempertimbangkan isu-isu yang timbul di Mahkamah Persekutuan dan isu-isu yang tertunda di hadapan beliau (lihat perenggan 24 & 26).

(2) Bawah Mahkamah Persekutuan, undang-undang bertulis boleh dibatalkan oleh mahkamah berdasarkan satu daripada tiga alasan iaitu: (a) dalam kes undang-undang bertulis persekutuan, kerana berkenaan perkara yang mana Parlimen tiada kuasa untuk membuat undang-undang dan dalam kes undang-undang bertulis negeri, kerana ini berkenaan dengan perkara yang mana Badan Perundangan Negeri tiada kuasa untuk menggubal; atau (b) dalam kes di mana kedua-dua undang-undang bertulis persekutuan dan negeri, kerana kedua-duanya konsisten dengan perkara 4(1); atau (c) dalam kes undang-undang bertulis negeri, kerana tidak selaras dengan undang-undang bertulis persekutuan. Mahkamah Tinggi kekal berbidang kuasa untuk mempertimbangkan isu sama ada seksyen tersebut diisytiharkan sebagai digubal secara sah oleh MUNS adalah tidak konsisten atau sebaliknya, dengan perkara 8 dan 10 Mahkamah Persekutuan, kerana cabaran kekonsistenan terjumlah bahawa alasan (2) dan ini bukan alasan untuk petisyen di Mahkamah Persekutuan dalam *ZI Publications* (lihat perenggan 27–28).

(3) Hakim Mahkamah Tinggi terkhilaf dalam menolak semakan kehakiman berdasarkan bantahan awalan dan dalam memutuskan bahawa perkara dalam permohonan semakan kehakiman telah diputuskan oleh Mahkamah Tinggi. Pembezaan mesti dibuat antara undang-undang itu sendiri dengan pelaksanaan undang-undang tersebut. Kesahan seksyen tersebut tidak, secara automatik, menjadikan tindakan responden-responden bawah seksyen tersebut sah. Mahkamah Tinggi berbidang kuasa memutuskan sama atau tidak tindakan yang diambil

oleh responden-responden sah, selaras dengan seksyen tersebut (lihat perenggan 31 & 39).]

Notes

For cases on judicial review in general, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 318–518.

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (folld)
Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (folld)
Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2013] 7 CLJ 681, CA (distd)
Kassim @ Osman bin Ahmad v Dato' Seri Jamil Khir bin Baharom Menteri di Jabatan Perdana Menteri (Hal Ehwal Agama Islam) & Ors [2016] 5 MLJ 258, CA (refd)
State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors [2015] 6 MLJ 736; [2015] 8 CLJ 975, FC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)
ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) [2016] 1 MLJ 153; [2015] 8 CLJ 621, FC (refd)

Legislation referred to

Companies Act 1965
Federal Constitution arts 4, 4(3), (4), 8, 8(1), 10, 10(2)(a), 76(1)(a), (1)(b), (1)(c), 128, 128(1), Part II, Ninth Schedule, State List
Firearms (Increased Penalties) Act 1971 s 5
Optical Discs Act 2000 ss 48, 52
Penal Code ss 392, 397
Printing Presses and Publications (Control of Undesirable Publications) Order 2012
Rules of Court 2012 O 53
Syariah Criminal Offences (Selangor) Enactment 1995 s 16

Appeal from: Application for Judicial Review No 25–154–07 of 2012 (High Court, Kuala Lumpur)

Fahri Azzat (Farhan Haziq, S Kiattilin and Surendra Ananth with him) (Fahri & Co) for the appellants.
Naziah Mokhtar (State Legal Advisor, Selangor State Legal Advisor's Office) for the first, second and fifth respondents.

Sulaiman Abdullah (Fakhrul Azman Abu Hasan and Zirwatul Hanan Abdul Rahman with him) (Azaine & Fakhrul) for the third and fourth respondents.
Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the sixth respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This was an appeal against the decision of the learned High Court judge in dismissing the applicants' ('the appellants') application for judicial review on a preliminary objection raised by the respondents.

[2] We heard the appeal and had unanimously allowed the same. We now give our reasons.

THE BACKGROUND FACTS

[3] The first appellant, a publisher of books, is a company incorporated under the Companies Act 1965.

[4] Mohd Ezra bin Mohd Zaid, ('the second appellant') is the principal shareholder and a director of the first appellant. The other shareholder and director is the second appellant's elder brother.

[5] One of the books published by the first appellant is a book entitled 'Allah, Kebebasan dan Cinta: Keberanian untuk menyelaraskan kebebasan dengan iman' ('the book'). The book which contained 388 pages is a translation of the English version entitled 'Allah, Liberty & Love: The Courage to Reconcile Faith and Freedom'. The English version was published by a publisher in Canada.

[6] The English version of the book was first published on 14 June 2011 while the Bahasa Malaysia version was published in May 2012. The English version and the Bahasa Malaysia version had been in circulation in Malaysia since June 2011 and 19 May 2012 respectively.

[7] On 24 May 2012, the Minister of Home Affairs issued the Printing Presses and Publications (Control of Undesirable Publications) Order 2012 ('the Order'). The Order which was published in the government *gazette* on 29 May 2012 prohibits the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of the book and its translated version throughout Malaysia ('the ban'). The ban was premised

on the ground that the book was prejudicial to morality and public order.

[8] On 29 May 2012, pursuant to a search warrant dated 28 May 2012, the Enforcement Division of the first respondent ('JAIS') raided the first appellant's office and confiscated 180 copies of the book. The second appellant was arrested and subsequently charged before the Syariah Court at Shah Alam, Selangor under s 16 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('the impugned section') which reads:

> 16 Religious publication contrary to Islamic law
>
> (1) Any person who —
>
> (a) prints, publishes, produces, records or disseminates in any manner any book or document or any other form of record containing anything which is contrary to Islamic Law; or
>
> (b) has in his possession any such book, document or other form of record for sale or for the purpose of otherwise disseminating it,
>
> shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
>
> (2) The Court may order any book, document or other form of record referred to in subsection (1) to be forfeited and destroyed notwithstanding that no person may have been convicted of an offence in connection with such book, document or other form of record.

[9] Aggrieved by the action of JAIS and its officers, the appellants filed an application for leave for judicial review naming JAIS, several of its officers, the State Government of Selangor and the Government of Malaysia as the respondents. By the judicial review application, the appellants sought for a declaration that the impugned section is null and void and for various consequential reliefs in the form of mandamus, prohibition, certiorari and damages to restrain further prosecution of the second appellant and for the return of the books seized by the respondents on the basis of the impugned section.

PROCEEDINGS IN THE HIGH COURT

[10] At the hearing of the judicial review application, the first and the fifth respondents namely JAIS and the State Government of Selangor, raised a preliminary objection premised on the decision of the Federal Court in *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153; [2015] 8 CLJ 621.

[11] In *ZI Publications* the appellants filed a petition to seek for a declaration that the Selangor State Legislative Assembly ('SSLA') has no power to enact the impugned section. The appellants argued that it is a matter which only Parliament has the power to legislate pursuant to art 10(2)(a) of the Federal Constitution and posed the following issues for determination by the Federal Court:

(a) whether the SSLA has the power to enact a law which is restrictive and/or has the power to restrict freedom of expression;

(b) alternatively, whether the SSLA can enact the impugned section in contravention of Part II of the Federal Constitution; and

(c) whether Parliament's powers to enact laws in relation to matters in the State List can only be exercised in the circumstances set out in art 76(1)(a), (b) and (c) of the Federal Constitution.

[12] The Federal Court held that the impugned section as enacted by the SSLA was valid and not ultra vires the Federal Constitution as the matter fell within the state power as stated in Item II, Ninth Schedule, which was the offence against the precepts of Islam.

[13] In arguing the preliminary objection, the respondents submitted before the learned judge that following the decision of the Federal Court in *ZI Publications*, the High Court had no jurisdiction to hear the appellants' application for judicial review.

[14] The appellants on the other hand submitted that the decision of the Federal Court in *ZI Publications*, was only concerned with the competency of the legislative power of the SSLA in enacting the impugned section. The constitutionality of the impugned section, in the sense of whether or not it was consistent with the various provisions of the Federal Constitution was not an issue before the Federal Court.

[15] The learned judge was not persuaded by the submission of learned counsel for the appellants. Her Ladyship concluded that because the Federal Court had decided that the impugned section is valid and not ultra vires the Federal Constitution, 'everything falls'. Further, the second category of the reliefs sought was in regards to the power of enforcement of JAIS which was not amenable to judicial review. The preliminary objection was thus upheld and the judicial review application dismissed, hence the appeal.

THE APPEAL

[16] Before us, learned counsel for the appellants contended that the learned High Court judge erred:

(a) in failing to properly consider the decision of the Federal Court in *ZI Publications* and the judicial review application that was before her; and

(b) in deciding on the challenge on the investigative and prosecutorial powers of JAIS, when the point was not argued by parties.

[17] Learned counsel argued that the respondents' preliminary objection was not sustainable in law because in *ZI Publications*, the direct reference to the Federal Court under art 4(4) of the Federal Constitution concerns only one issue ie the legislative power of the SSLA in enacting the impugned section. Other issues pleaded in the judicial review application were not ventilated in the Federal Court.

[18] In resisting the appeal, learned counsel for each set of the respondents adopted each other's submission. On the point of art 4(4), learned counsel for the third and fourth respondents submitted that the appellants were in fact making a challenge on the legislative power of the SSLA by way of a collateral attack in the judicial review proceedings, which the appellants were not allowed to do on the authority of *State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 6 MLJ 736; [2015] 8 CLJ 975 and *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765.

[19] For the first and the fifth respondents, learned assistant state legal adviser ('ALA'), repeated her arguments before the High Court that as the reliefs sought by the appellants were to challenge the validity and constitutionality of the impugned section and as the Federal Court had already decided on the matter in *ZI Publications*, the High Court had no jurisdiction to hear the appellants' judicial review application. And since the impugned section is valid and not ultra vires the Federal Constitution, all actions taken by the first to the fifth respondents based on the Syariah Criminal Offences (Selangor) Enactment 1995 ('the 1995 Criminal Offences Enactment') are also valid and constitutional. Learned ALA further submitted it follows that any challenge to the actions taken under the impugned section must be instituted in the Syariah Court.

[20] Relying on *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor* [2013] 7 CLJ 681, learned ALA also submitted that the reliefs sought by the appellants relate to the enforcement powers of the religious authorities under the 1995 Criminal Offences Enactment which are not amenable to judicial review under O 53 of the Rules of Court 2012.

[21] Learned senior federal counsel for the sixth respondent likewise submitted that the High Court had no jurisdiction to hear the judicial review application for the same reasons canvassed by learned ALA.

OUR DECISION

[22] Essentially, in dismissing the judicial review application on the preliminary objection raised by the respondents, the learned High Court judge concluded that the Federal Court in *ZI Publications* had decided on the subject matter of the judicial review application and that there was nothing left to be decided by the High Court.

[23] At this juncture it is convenient to refer to the reliefs sought by the appellants in the judicial review application as reproduced below:

1. Satu pengisytiharan bahawa s 16 Enakmen Jenayah Syariah (Selangor) 1995 adalah terbatal dan tidak sah ('null and void') memandangkan ia adalah tidak konsisten dengan Artikel 10(1)(a) dan 8(1) Perlembagaan Persekutuan.

2. Satu perintah bersifat Prohibition, menurut perenggan 1, Jadual kepada Akta Mahkamah Kehakiman, 1964 ditujukan kepada:

    2.1 Responden Ketiga melarang Responden Ketiga, kakitangan-kakitangannya, pegawai-pegawainya dan/atau agen-agennya, kesemua orang yang dilantik sebagai Pegawai Penguatkuasa Agama dan yang melaporkan diri kepada Responden Ketiga dan kesemua orang yang bertindak di bawah kawalan dan arahan am Responden Ketiga daripada menjalankan penyiasatan atau meneruskan penyiasatan di bawah s 16(1)(a) dan/atau (b) Enakmen Jenayah Syariah (Selangor) 1995 terhadap Pemohon-pemohon.

    2.2 Responden Keempat melarang Responden Keempat, agen, pekerja dan/atau pengkhidmatnya, kesemua orang yang dilantik untuk menjadi Pendakwa Syarie dan kesemua orang yang bertindak di bawah kawalan dan arahan am Responden Keempat daripada memulakan atau menjalankan apa-apa prosiding di bawah seksyen 16(1)(a) dan/atau (b) Enakmen Jenayah Syariah (Selangor) 1995 terhadap Pemohon-pemohon;

3. suatu Perintah Certiorari membatalkan tindakan oleh Responden Ketiga, agen, pekerja, dan/atau pengkhidmatnya dalam menyerbu, menggeledah, merampas dan menyita Buku tersebut (iaitu 'Allah, Kebebasan dan Cinta' dengan tajuk kecil 'Keberanian untuk menyelaraskan kebebasan dengan iman') di premis Pemohon Pertama.

A

4. suatu Perintah Certiorari membatalkan tangkapan dan secara susulan jaminan atau Bon Kehadiran bertarikh 29.05.2012 atau keputusan pendakwaan oleh Responden Keempat terhadap Pemohon-pemohon [selepas ini perenggan 3 dan 4 di atas dirujuk sebagai '*Tindakan JAIS*'].

B

5. suatu Perintah Mandamus yang ditujukan terhadap Responden Pertama hingga Kelima dan setiap satu dari mereka supaya:

C

5.1 Responden Pertama hingga Kelima dan setiap satu dari mereka hendaklah mengemukakan semua rekod dan dokumen berkenaan Tindakan JAIS kepada Mahkamah Yang Mulia ini untuk disemak supaya JAIS diarahkan menarik balik dan membatalkan Tindakan JAIS tersebut;

D

5.2 JAIS mengemukakan semua rekod dan dokumen berkenaan tangkapan, Bon Kehadiran dan suratcara pendakwaan terhadap Pemohon Kedua kepada Mahkamah Yang Mulia ini untuk disemak supaya JAIS diarahkan menarik balik dan membatalkan tangkapan, Bon Kehadiran dan pendakwaan terhadap Pemohon Kedua; dan

5.3 Responden Ketiga mengembalikan 150 salinan Buku tersebut yang telah disita olehnya.

E

6. suatu Deklarasi bahawa:

F

6.1 Enakmen Jenayah Syariah (Selangor) 1995 ('*Enakmen Jenayah 1995*'), Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ('*Enakmen Pentadbiran 2003*') dan Enakmen Tatacara Jenayah Mahkamah Syariah (Negeri Selangor) 2003 adalah enakmen-enakmen yang hanya terpakai kepada 'persons professing the religion of Islam' dan bukannya terhadap Pemohon Pertama;

G

6.2 Selanjutnya dan dalam apa keadaan sekalipun peruntukan tatacara dan prosedur untuk perlaksanaan enakmen-enakmen tersebut yang terkandung dalam Enakmen Tatacara Jenayah Mahkamah Syariah (Negeri Selangor) 2013 seharusnya juga terpakai kepada 'persons professing the religion of Islam' dan bukannya terhadap Pemohon Pertama;

H

6.3 s 16(1)(a) dan/atau (b) Enakmen Jenayah Syariah (Selangor) 1995 tidak menjadikan ia suatu jenayah apa-apa tindakan ('does not criminalize an act') untuk menterjemahkan buku-buku yang diterbit ('published') oleh Random House Canada, anggota The Random House of Canada, Limited, Toronto;

I

6.4 menurut Artikel 121(1) Perlembagaan Persekutuan, Mahkamah yang mempunyai bidangkuasa dan merupakan forum yang layak dan sesuai bagi memberikan tafsiran berkenaan pemakaian Akta Cetak 1984 ke atas Enakmen

Jenayah, 1995, Enakmen Pentadbiran, 2003 dan Enakmen Tatacara Jenayah Mahkamah Syariah (Negeri Selangor) 2003 serta memutuskan keperlembagaan tindakan JAIS adalah Mahkamah Tinggi Malaya dan bukan Mahkamah Syariah;

6.5 oleh sebab perkara yang dinyatakan di perenggan 6.4 di atas, JAIS tidak boleh membuat atau meneruskan sebarang pendakwaan terhadap Pemohon-pemohon sehinggalah pelupusan Semakan Kehakiman ini;

6.6 Waran Geledah bertarikh 28.05.2012 adalah terbatal dan tidak sah ('null and void'); dan

7. suatu Perintah bahawa segala prosiding lanjut dalam Tindakan JAIS, tindakan tangkapan dan semua tindakan susulan termasuk pendakwaan ke atas Pemohon Kedua digantung, sehingga pelupusan akhir dan muktamad permohonan untuk semakan kehakiman ini;

8. pampasan ditaksirkan di atas tekanan mental ('mental distress'), keseksaan jiwa ('agony') dan deraan ('torture') yang dialami dan ditanggung oleh Pemohon-pemohon akibat Tindakan JAIS yang salah ke atas Pemohon Pertama dan Kedua;

9. bahawa kos-kos dalam permohonan ditanggung oleh Responden-Responden; dan

10. sebarang arahan, perintah atau writ lain bagi penguatkuasaan hak-hak yang diberikan oleh Bahagian II Perlembagaan Persekutuan, atau mana-mana daripada mereka, atau untuk memberikan keadilan yang sepenuhnya di dalam perkara di dalam ini.

[24] From the above, it is apparent that there are a host of other issues present in the judicial review application which were not before the Federal Court in *ZI Publications*. We therefore found merits in the submission of learned counsel for the appellant that in dismissing the judicial review application on the basis of the preliminary objection, the learned judge erred in failing to fully appreciate the issues that were before the Federal Court and the issues pending before her.

[25] In *ZI Publications*, the appellants filed a petition pursuant to art 4(4) of the Federal Constitution to challenge the competency of the SSLA in enacting the impugned section. The relief of declaration sought for in prayer 1 of the judicial review application however concerned the consistency of the impugned section vis a vis art 10 and art 8 of the Federal Constitution.

[26] The learned judge failed to appreciate that there is a distinction between challenging the competency of SSLA to enact the impugned section and challenging the consistency of the impugned section vis a vis art 8 and art 10 of the Federal Constitution. The distinction can be gathered from the judgment

of the Federal Court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112.

[27] In *Ah Thian*, the applicant was charged with committing armed robbery under ss 392 and 397 of the Penal Code, an offence punishable under s 5 of the Firearms (Increased Penalties) Act 1971. At the close of the case for the prosecution, the applicant made an application to the Federal Court under art 4(4) of the Federal Constitution for a declaration that the Firearms (Increased Penalties) Act 1971 as amended by the Firearms (Increased Penalties) (Amendment) Act 1974 (Act A256) is ultra vires the Federal Constitution as it contravenes art 8(1) of the Federal Constitution and is therefore void. In remitting the matter for continuation of trial by the High Court, Suffian LP held that cl (4) of art 4 and cl (1) of art 128 of the Federal Constitution do not apply and that the point may be raised in the ordinary way in the course of submission and be determined in the High Court. His Lordship stated thus at p 113:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> Under our Constitution, written law may be invalidated on one of three grounds:
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State legislature has no power to make law, art 74; or
>
> (2) in the case of both Federal and State written law, because it is inconsistent with art 4(1); or
>
> (3) in the case of a State written law, because it is inconsistent with Federal law, art 75.
>
> The court has power to declare any federal or state law invalid on any of the above three grounds.
>
> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restriction, and may be exercised by *any* court in the land and in *any* proceeding whether it be started by Government or by an individual.
>
> But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.
>
> First, cl (3) of art 4 provides that the validity of any law made by Parliament or by a State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:
>
> (a) in proceedings for a declaration that the law is invalid on that ground; or
>
> (b) if the law was made by Parliament, in proceedings between the Federation and one or more States; or

(c) if the law was made by a State Legislature, in proceedings between the Federation and that State.

...

Secondly, cl (4) of art 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings ...

Thirdly, cl (1) of art 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant Legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. ...

[28] Guided by the above judgment of the Federal Court, it is plain that the High Court retained the jurisdiction to consider the issue whether the impugned section which was declared to be validly enacted by SSLA was inconsistent or otherwise with arts 8 and 10 of the Federal Constitution, because that consistency challenge fell under ground (2) illustrated in *Ah Thiam*, and that was not the ground for the petition before the Federal Court in *ZI Publications*.

[29] The cases of *Muhammad Juzaili* and *Titular Roman Catholic Archbishop* where the Federal Court decided that the High Court ought not to have entertained the challenge on the validity or constitutionality of the impugned provisions do not support the respondents' position. In those two cases, the challenge was premised on the first ground as illustrated in *Ah Thian*, where the proceedings ought to have been commenced as in type (a) in *Ah Thian* but the specific procedures as laid down in cll (3) and (4) of art 4 of the Federal Constitution had not been adhered to (see pp 744–749 of *Muhammad Juzaili*'s case and p 794 of *Titular Roman Catholic Archbishop*'s case).

[30] In the instant appeal, the appellants in filing the petition in *ZI Publications* seeking to challenge the validity of the impugned section under the first ground of *Ah Thian*, had followed the procedure stipulated in cll (3) and (4) of art 4 of the Federal Constitution.

[31] For the above reasons, we were unanimous in our view that the learned judge erred in dismissing the judicial review application on the preliminary objection and in concluding that the matter in the judicial application had been decided by the Federal Court. To reiterate, the preliminary objection raised by the respondents concerned the constitutionality of the impugned section on ground of competency of the SSLA to enact the impugned section. The preliminary objection was not related to the other prayers in the judicial

review application in particular the relief of declaration and the aspect of investigation, arrest and seizure which ought to be determined by the High Court on the merits.

[32] On the point of investigation, arrest and seizure which the respondents contended were not amenable to judicial review and which found favour with the learned judge, we noted the following exchanges between the learned judge and learned counsel for the appellant (see p 5: *rekod rayuan tambahan* II):

> Hakim: So everything falls. Because the whole of s 16 is a valid section. Then the second category is in regards to the powers of enforcement.
>
> Fahri: Yes, My Lady.
>
> Hakim: Is the enforcement power in relation to s 16?
>
> Fahri: Yes, My Lady.
>
> Hakim: Why should it be challenged if the whole thing is valid?
>
> Fahri: My Lady, the law itself could be challenged. I mean there is a challenge on the law and a challenge of the execution of the law. ...
>
> Hakim: But isn't this a state law? So if it a valid state law, any challenge would go back to the Syariah Court and not this court. ...
>
> ... In a nutshell, it is a valid law as pronounced by the Federal Court. So where is the other PO?
>
> Naziah: Basically, it's concluded in that way.
>
> Hakim: Paragraph 2 is in regards to the enforcement power.
>
> ...
>
> I know this has not been addressed by the Respondent (*sic*) but I have the privilege to refer to the case of Empayar Canggih.

[33] We noted that the learned judge was mindful that parties had not submitted on the issues of investigation, arrest and search but she nevertheless proceeded to dismiss the judicial review application on the authority of *Empayar Canggih*. In this regard, we respectfully endorsed the judgment of Arifin Zakaria CJ in *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590 where His Lordship said at pp 599–600:

> [19] Based on the transcript, which was not challenged by the defendant, it is clear that the Court of Appeal failed to give the plaintiff the right to reply on the defence of absolute privilege. In the circumstances we agree with the learned counsel for the plaintiff that the Court of Appeal had acted contrary to the rules of natural justice. In an adversarial system, parties must be given the right of hearing, by that we mean the right to present his case before the court. This is to assist the court in coming to its decision. The danger of the court making decision on its own without hearing parties was highlighted by the Federal Court in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293, where Zaki Azmi CJ observed at p 302:

> It is therefore dangerous and totally inadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point (see *Hoecheng Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 at pp 407–409.
>
> ...
>
> [21] It is thus clear that whenever the court proposes to consider a fresh issue which the court considers pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding. This is fundamental in the adversarial system that we practise in this country.

[34] As for *Empayar Canggih*, the facts are as follows. The appellant who was carrying on the business of replicating video compact discs ('VCD') and compact discs ('CD') was granted an optical discs manufacturing licence by the Ministry of Domestic Trade and Consumer Affairs under the Optical Discs Act 2000 ('the Act'). The appellant wanted to upgrade its business to that of replicating digital video compact disc ('DVD') at its new premises. For that purpose, the appellant needed a licence. It applied to the Ministry for renewal of its existing licence under the Act and to operate the DVD replicating business at its new premises. Pending the granting of the licence for the DVD replicating business at the new premises, the officers from the Ministry searched the appellant's new premises, seized the machines, equipment and other items therein. The appellant wrote for the return of the seized items but the Ministry failed to return them. Upon a joint inspection, the items were found to be badly damaged.

[35] The appellant then filed an application in the High Court to commence judicial review proceedings against the respondents seeking for, inter alia, a declaration that the seizures carried out was without reasonable cause and for damages suffered due the unlawful seizure. The application was dismissed by the High Court. The High Court held that the seizure was made with reasonable cause in the exercise of an investigative function.

[36] Dissatisfied with the High Court order, the appellant appealed to this court. The appeal was dismissed. This court speaking through Zaharah Ibrahim JCA (now FCJ) held, inter alia, that the removal of the seized items was done in the bona fide exercise of an investigative function under the Act. This court further held that due to ss 48 and 52 of the Act which provide respectively for non-recovery of costs or damages arising from seizure and protection of officers, the acts of removing the seized items fell outside the scope of judicial review.

[37] With respect, we were of the view that reliance by the learned judge on *Empayar Canggih*, in the circumstances of the instant appeal was misplaced. We observed that in *Empayar Canggih*, in coming to the conclusion that the search of the appellant's new premises and the seizure of the items were made with reasonable cause in the exercise of an investigative function, the High Court and this court took into consideration the affidavit evidence. In other words, the case was decided after substantive hearing. Unlike in the instant appeal, the investigation, arrest and seizure were issues yet to be determined by the High Court on substantive hearing.

[38] On the learned judge's reasoning that there can be no challenge on the actions taken by the respondents because the impugned section had been declared valid by the Federal Court, we opined with respect, that the reasoning was flawed. If the learned judge's reasoning were to be accepted, there can never be any challenge in respect of any decision made by any public authorities if the law under which they acted were laws validly enacted by the Legislature.

[39] A distinction has to be drawn between the law itself and the enforcement of such law. The validity of the impugned section did not automatically render the enforcement action of the respondents under the impugned section valid. It was for the High Court to determine whether or not the action taken by the respondents was valid in accordance with the impugned section. In respect of the learned judge's observation that any challenge should go back to the Syariah Court we need only refer to the case of *Kassim @ Osman bin Ahmad v Dato' Seri Jamil Khir bin Baharom Menteri di Jabatan Perdana Menteri (Hal Ehwal Agama Islam) & Ors* [2016] 5 MLJ 258. In *Kassim @ Osman bin Ahmad*, this court in allowing the appellant's appeal against the dismissal by the High Court of his judicial review application granted an order of certiorari and mandamus against Jabatan Agama Islam Wilayah Persekutuan.

CONCLUSION

[40] Applying *Ah Thian* we disagreed with the learned judge that due to the decision of the Federal Court in *ZI Publications*, the High Court had no jurisdiction to hear the application for judicial review.

[41] The appeal was therefore allowed and the matter was remitted to the High Court for the substantive hearing of the judicial review application. We made no order as to costs.

Appeal allowed with no order as to costs.

Reported by Afiq Mohamad Noor